FILE COPY

Office Supreme Court, U.
FILED
OCT 1 1929
CHARLES ELMORE CROP
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. [redacted] 44.

DISTRICT OF COLUMBIA, PETITIONER,

vs.

GEORGIANA THOMPSON.

BRIEF ON BEHALF OF PETITIONER.

WILLIAM W. BRIDE,
Corporation Counsel;
ALEXANDER H. BELL, JR.,
Assistant Corporation Counsel,
Attorneys for Petitioner.

INDEX.

Subject Index.

	Page
Statement of case	1
Assignment of errors	7
Argument	7
I. Jurisdiction of municipal court	7
II. The statute of limitations	10
III. Abandonment of the street as a matter of fact	11
IV. Abandonment as a matter of law	15
Conclusion	19

Table of Authorities.

Barnett vs. Denison, 145 U. S., 135, 139	16
Bauman vs. Ross, 167 U. S., 548	8
Brown vs. District of Columbia, 127 U. S., 579	12
District of Columbia vs. Bailey, 171 U. S., 161	9, 18
Myers vs. D. C., 25 App. D. C., 132	18
Stone vs. Bank of Commerce, 174 U. S., 412	13
Walter vs. MacFarland, 27 App. D. C., 182	16
Washington Railway and Electric Company vs. Newman, 41 App. D. C., 443	13

Statutes.

Act of June 11, 1878 (20 Stat., 102)	9
Act of December 24, 1890 (26 Stat., 1113)	13
Act of February 17, 1909 (35 Stat., 623)	8
Act of March 1, 1912 (37 Stat., 71)	1, 10
Act of March 3, 1921 (41 Stat., 1310)	8
Section 9 of the Code of Law for the District of Columbia	8
Section 491-*j* of the Code of Law for the District of Columbia	11
Section 1265 of the Code of Law for the District of Columbia	7, 10

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 723

DISTRICT OF COLUMBIA, PETITIONER,

vs.

GEORGIANA THOMPSON.

BRIEF ON BEHALF OF PETITIONER.

Statement of Case.

An Act of Congress approved March 1, 1912 (37 Stat. 71), entitled "An Act to authorize the extension of Lamont Street, Northwest, in the District of Columbia," provided:

> "*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That under and in accordance with the provisions of subchapter

one of chapter fifteen of the Code of Law for the District of Columbia, within six months after the passage of this Act, the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute in the Supreme Court of the District of Columbia a proceeding in rem to condemn the land that may be necessary to extend Lamont Street northwest through squares numbered twenty-six hundred and four and twenty-six hundred and five, with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street. *Provided, however,* That the entire amount found to be due and awarded by the jury in said proceeding as damages for and in respect of the land to be condemned for said extension, plus the costs and expenses of said proceeding, shall be assessed by the jury as benefits.

SEC. 2. That there is hereby appropriated, out of the revenues of the District of Columbia, an amount sufficient to pay the necessary costs and expenses of the said condemnation proceeding taken pursuant hereto, and for the payments of the amounts awarded as damages, to be repaid to the District of Columbia from the assessments for benefits and covered into the Treasury to the credit of the revenues of the District of Columbia.

Approved March 1, 1912."

Condemnation proceedings in the Supreme Court of the District of Columbia were had under the authority of said Act and the condemnation jury appointed in said cause duly returned its verdict, which was rati-

fied and confirmed by the court on February 3, 1913 (R., p. 5). By said verdict the jury allowed as the value of the land condemned, known as parts of Square 2605 and Square 2604, $13,737.48, and costs of $463.78, or a total of $14,201.26, such sum being assessed as benefits against the adjacent property in the abutting Squares 2602, 2603, 2604, 2605, 2606, and 2607. Respondent was the owner of Lot 101, Square 2603, which was assessed $200.00 as the amount of its proportionate share of such benefits. Said lot was sold for nonpayment of this assessment on March 17, 1921, but later redeemed from said sale by the payment of said sum of $200.00 and interest to the Collector of Taxes (R., p. 4).

On June 22, 1927, in the Municipal Court of the District of Columbia, said respondent filed a declaration in assumpsit, alleging, in substance, that notwithstanding the authorization of the above-mentioned statute, the District of Columbia had wholly failed to extend Lamont Street through said squares; that the District of Columbia had wholly abandoned, renounced and repudiated the purpose of said condemnation; that demand had been made upon said District for a refund of the $200.00 so paid, but the same had never been refunded (R., p. 1).

To said declaration the District of Columbia filed, first, a plea to the jurisdiction and, second, an affidavit of defense. The plea stated, in substance, that the supposed cause of action did not arise out of any contract, expressed or implied, whereby any debt was due plaintiff (respondent here), nor did the amount

claimed by plaintiff arise out of damages due from the same, or from any wrong or injury to the plaintiff or her property (R., pp. 2, 3). The affidavit of defense filed by the said District admitted the condemnation proceedings and the assessment for $200.00 growing therefrom, but set forth that although it protested the necessity so to do, the District denied it had abandoned the purpose of said condemnation. Said affidavit of defense further stated that more than three years had elapsed since the time when the right to maintain said action, if any, accrued. (R., pp. 3, 4).

Trial was had, without jury, upon the above pleadings, at which certain evidence was introduced by respondent Thompson to the effect that since the ratification of the verdict in the condemnation case and to the time of filing said suit the land condemned had not been laid out into roadway, sidewalk, or parking space, nor had it been graded, paved or otherwise physically improved for highway purposes, nor had any special appropriation been made by Congress for such physical improvement (R., pp. 5, 6). That in the year 1924 the District of Columbia laid and completed a cement sidewalk and curb across the east end of the condemned tract, the said sidewalk and curb constituting an effective obstruction to any vehicular traffic over the condemned land (R., pp. 6, 7). *That no official action had been taken by the Commissioners of the District of Columbia or by Congress looking to the abandonment of the title to said land or to the abandonment of the right to physically improve said street* (R., p. 7).

Respondent Thompson introduced in evidence, over objection and exception of the District of Columbia, the following letter:

JANUARY 29, 1926.

"Mr. Paul V. Rogers,
Counsellor at Law, Evans Building,
Washington, D. C.

DEAR SIR:

Receipt is acknowledged of your letter of January 7, 1926, in which you state that you represent several taxpayers, and particularly Georgiana K. Thompson, with reference to certain assessments made under proceedings for the extension of Lamont Street, N. W., as authorized by the Act of Congress approved March 1, 1912. You further state that it appears that the District has now abandoned the project for the extension of this street, and you have advised your clients that under the circumstances the retention by the District of the benefits so assessed and paid was improper and claim should be made for the refund thereof.

The official files of the Engineer Department indicate that it was never the intention to open Lamont Street between Squares 2604 and 2605 to vehicular traffic, because of the excessive grade. Moreover, it appears that the principal reason for condemnation of the land was to preserve the vista to the Zoological Park and to provide access to the park. The record also shows that it was the intention to treat this street with terraces and steps.

The assessments for benefits in this case were made under a formal condemnation proceeding, and the verdict of the jury was duly ratified and

confirmed by the Court. Therefore, the assessments from our consideration of the matter, were legally made, and are legally payable. The only condition under which a refund of the payment made to the District of Columbia can be made is where the facts show the payment to have been made in error. This condition is not present in the matter of the benefit assessments paid under the Lamont Street proceedings.

You are advised that an application for such refunds will not be entertained by this office.

Very truly yours,

(Signed) D. J. DONOVAN,
D. J. DONOVAN,
Auditor of the District of Columbia.

Whereupon judgment was entered for respondent, plaintiff below, for the amount claimed (R., p. 9).

After the entry of said judgment the Disrtict of Columbia petitioned the Court of Appeals of said District for a writ of error to the Municipal Court to review said decision. The Court of Appeals granted the petition, the cause was argued, and on January 7, 1929, said Court of Appeals rendered its decision (R., p. 13 *et seq.*), affirming the judgment of the Municipal Court. In accordance with the rules of the Court of Appeals a petition for rehearing was filed, which was denied.

The case is now before this Honorable Court by virtue of the granting of a writ of certiorari to the Court of Appeals of the District of Columbia (R., p. 23).

This cause is one of a series of suits now pending in the Municipal Court and the Supreme Court of the

District of Columbia which have been filed to recover practically the entire amount assessed as benefits in the Lamont Street condemnation case, aggregating approximately $14,000.00.

Assignment of Errors.

The petitioner assigns for error in this case:

1. The ruling of the court below that the Municipal Court of the District of Columbia had jurisdiction over the cause of action or of the parties thereto.

2. The ruling of the court below that a letter of the Auditor of the District of Columbia constitutes admissible evidence of an intention on the part of petitioner to abandon a condemnation project authorized and directed to be carried out by a special Act of Congress.

3. The ruling of the court below, in substance, that defendant could, as a matter of law abandon, and had, as a matter of fact abandoned the extension of Lamont Street.

4. The ruling of the court below that the time for respondent to bring her action had not expired under the provisions of Section 1265 of the Code of Law for the District of Columbia.

ARGUMENT.

I.

Jurisdiction of Municipal Court.

The jurisdiction of the Municipal Court is purely statutory and is set forth in the amendatory Act of

Congress approved March 3, 1921 (41 Stat. L. 1310), wherein it is provided that the Municipal Court "shall have exclusive jurisdiction in the following civil cases, * * * namely, in the classes of cases over which the Court has jurisdiction immediately prior to the passage of this Act * * *."

The Act of Congress of February 17, 1909 (35 Stat. L. 623), creating the Municipal Court provided:

> "The said Court and each member thereof shall exercise the same jurisdiction as vested in them as justices of the peace * * * and no more * * *."

Under Section 9 of the Code of Law for the District of Columbia the jurisdiction is limited to amounts "claimed to be due and debts or damages arising out of contracts, expressed or implied, or damages for wrongs or injuries to persons or property."

Petitioner denies any *personam* obligation to return the tax paid by respondent or that the declaration filed herein sets forth any facts upon which the Municipal Court might render a valid judgment. The liability imposed by the assessment was a legal one, free from duress or mistake, and arose from positive law not contractual in its nature. The assessment herein involved was a special levy and was a result of the plenary and absolute power of taxation of Congress over the District of Columbia and is an attribute of the sovereignty of Congress (Bauman *vs.* Ross, 167 U. S. 548). The District of Columbia, while having the right to sue and be sued, contract and be contracted with, and exercise other powers of a munici-

pal corporation, has no sovereign power, and its governing officials, the Commissioners of the District, are prohibited from making any contract not authorized by Congress. Section 3, paragraph 3, of the Act of Congress providing a permanent form of government for the District, approved June 11, 1878 (20 Stat. L. 102), expressly states:

> "But said Commissioners, in the exercise of such duties, powers of authority, shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress."

The assessment against respondent, being a result of the exercise of the taxing power and being admittedly lawfully imposed by respondent, has been collected as authorized by Congress under the authority of other sections of the Act last above quoted.

Respondent bases her claim upon the principle that there was a contractual relation between her and the District of Columbia. As the statute above quoted precludes the Commissioners of the District from making any contract other than those as shall be thereafter provided for and as shall be approved by Congress, there was no jurisdiction in the Municipal Court.

In the case of District of Columbia *vs.* Bailey, 171 U. S. 161, this Court held that an agreement to arbitrate not under rule of court or within the terms of a statute enacted for such purpose, was a contract, and that the Commissioners of the District of Columbia, under the Act above quoted, had not the power to so

bind the District. It will be observed that the Court of Appeals made no comment on this point other than to say (R., p. 20) that the Municipal Court had jurisdiction of the parties and of the subject-matter.

II.

The Statute of Limitations.

Section 1265 of the Code of Law for the District of Columbia provides:

> "No action shall be brought * * * upon any simple contract, express or implied * * * after three years from the time when the right to maintain any such action shall have accrued; * * *."

As the Municipal Court held, and was affirmed in its decision by the Court of Appeals, that a contractual relation existed between the parties to this suit that Lamont Street be physically improved, it becomes important to determine when such contract arose. If, as seems to be the case, respondent contends that the wording of the Act of Congress authorizing the extension of Lamont Street raises an express promise or order that it be done, then there can be no basis for a claim of an implied contract. Section 1 of the Act of March 1, 1912 (37 Stat. L. 71), authorized and directed the Commissioners of the District of Columbia, in accordance with Chapter 15 of the Code of Law for the District of Columbia, to institute within six months a proceeding *in rem* in the Supreme Court of the District—

> "To condemn the land that may be necessary to extend Lamont Street, Northwest, through squares numbered 2604, 2605, with a width of ninety feet, said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

Lamont Street east of Nineteenth Street was at that time graded and physically improved for street and traffic purposes.

By Section 491*j* of the Code of Law for the District, the tax here involved was collectible in five equal annual installments from and after sixty days after the confirmation of the verdict of the condemnation jury. The verdict having been ratified on February 3, 1913, it would necessarily follow that the present claimed right of respondent arose within the limit of three years thereafter, or on or before February 3, 1918, and none being brought within that period, the claim is barred.

If, on the other hand, the acceptance by the Collector of Taxes of the amount involved on March 15, 1923, constituted a new promise to pave and improve Lamont Street, the limitation had been exceeded by three months when the suit was filed in the Municipal Court on June 22, 1927.

III.

Abandonment of the Street As a Matter of Fact.

The argument in the Court below on behalf of respondent proceeded almost entirely upon the theory

that petitioner had in fact abandoned the extension of Lamont Street. The court below, in its opinion (R. p. 20), states:

> "In the present case, the first definite statement of the District's interpretation of the condemnation act and of the District's purpose not to open the street was in the communication of January 29, 1926."

The communication referred to was the letter of the District Auditor, *supra.*

In other words the only evidence before the Court, at any time, that the District of Columbia intended to abandon Lamont Street was the communication above referred to. If, then, this evidence was inadmissible as a matter of law to prove an intention to abandon, there was then no evidence either before the Municipal Court or the Court of Appeals to support a finding of fact that the District had abandoned said street. It will be noted that exception was taken by petitioner at the trial of this case to the admission in evidence of said letter (R., p. 7). If the Auditor of the District of Columbia had no power to bind the municipality, the letter should not have been admitted in evidence, because his action would be a nullity and the letter immaterial to the issues involved.

In the case of Brown *vs.* District of Columbia, 127 U. S. 579, the plaintiff sued to recover damages for breach of contract. It appeared that the Secretary of the Board of Public Works had, by letter, accepted an offer advanced by plaintiff to pave certain streets. This Court, in its opinion, said:

> "Numerous authorities are cited to show that the written acceptance by one party of a written proposal made to him by another party creates a contract of the same force and effect, as if formal articles of agreement had been written out and signed by said parties. The legal principle asserted is sound, but the fallacy of the argument lies in the assumption that the proposition of the pavement company was in fact submitted to the Board, and that the latter did in fact authorize the letter to be written by Secretary Johnson accepting the said proposition."

In the case of Stone *vs.* Bank of Commerce, 174 U. S. 412, the city attorney entered into a stipulation with certain banks that the latter should abide by the results of certain test cases. This Court held that the attorney's duties were to give legal advice to the city officials and boards and to prosecute and defend suits for the city, but that he had no power to bind the city by such an agreement.

It is important to note that the evidence discloses that no official action had been taken by the Commissioners, or by Congress, looking to the abandonment of the title to the condemned land or of the right of the District of Columbia to physically improve it since its acquisition by condemnation (R., p. 7). If, then, the Commissioners had taken no action indicating an intention to abandon Lamont Street, and the Commissioners can only act officially sitting as a Board (Act of Congress, December 24, 1890, 26 Stat. 1113; Washington Railway and Electric Company *vs.* Newman, 41 App. D. C. 443), it is difficult to see how the District

Auditor, himself only a subordinante official of the municipality, could, by the mere writing of a letter, furnish sufficient evidence to support a finding of fact on a matter which could only have been evidenced by an official act of the Commissioners themselves, sitting as a Board, assuming even that said Commissioners would have the power to take official action looking to the abandonment of the street in question.

Counsel for respondent state in their brief in the court below (p. 14, 15):

> "The duty to improve a tract of land condemned for street purposes is, we submit, in the nature of a legislative discretionary duty delegated by Congress to the Commissioners of the District of Columbia. However hard it may seem on the taxpayer no right vests in him by the delay of the Commissioners in the exercise of its discretionary determination. It is only when the Commissioners have, either exercised the discretionary power vested in them, or have expressed, by word or act, an intention not to exercise the discretionary power at all, that a right vests in the taxpayer."

Passing for a moment the question of whether the power delegated by Congress is discretionary, the record fails to disclose a single instance where the Commissioners "have expressed by word or action an intention not to exercise the power so delegated." On the contrary, as before stated, the record discloses that they have taken no action looking to the abandonment of the street (R. p. 7).

Moreover, in the petition for a rehearing filed in the Court of Appeals, petitioner stated that the court had

"arrived at an erroneous conclusion of fact as to the intention of the Commissioners to abandon the opening of said street. To support this contention, and to show that the matters set forth in the aforesaid letter of the Auditor of the District of Columbia did not constitute the facts as to petitioner's intention, the following official action of the Commissioners of the District of Columbia was taken on January 23, 1929:

> 'In regard to the matter of the improvement of Lamont Street between 19th Street and Adams Mill Road Northwest, I MOVE that the Commissioners assert their intention to open and improve this Street and that the Engineer Department present an estimate for grading this Street in the Budget estimates for the fiscal year 1931.
>
> APPROVED by the Commissioners of the District of Columbia, sitting as a Board, January 23, 1929.
>
> DANIEL E. GARGES,
> *Secretary.*' "

We, therefore, submit that there is nothing in the case to support a finding of fact that the Commissioners of the District of Columbia had abandoned the extension of Lamont Street, because the only evidence offered to prove such intention was inadmissible.

IV.

Abandonment As a Matter of Law.

It has been held repeatedly by this Honorable Court and by the Court of Appeals of the District of Colum-

bia that the Commissioners of said District are merely ministerial officers deriving their powers solely through the special grant of power by Congress. We submit, therefore, that the Honorable Court of Appeals in the present case has been inconsistent, not only with its own prior decisions, but has failed, as well, to follow the opinions of the Supreme Court of the United States.

A legal controversy closely approaching in similarity the situation presented by the case now before the court is exemplified by the case of Walter *vs.* MacFarland, 27 Appeals, D. C., 182. In that case the question before the court was whether the Commissioners of the District of Columbia had the power to make changes in the established public roadways of the city of Washington. The language of the opinion is so pertinent to the present case that the indulgence of the court is asked to quote at some length from the decision. The court said:

> "Municipal governments exist and exercise authority through legislative sanction. For convenience of administration they are created as agents of government for certain local purposes, and have such powers only as are expressly conferred or may be fairly and reasonably implied as necessary to carry into effect such as have been expressly granted. Barnett *vs.* Denison, 145 U. S. 135, 139, 36 L. ed. 652, 653, 12 Sup. Ct. Rep. 819. And while the laying out, opening, and improvement of streets in towns and cities are matters of peculiar fitness for municipal regulation and control, powers relating thereto must be similarly construed. • • •

"The municipal organization of the District of Columbia is of a peculiar character. There is no general organic law covering all of the ordinary powers usually conferred in the creation of municipal corporations throughout the several States of the Union,—no formal municipal charter, so to speak.

"The commissioners, though vested from time to time with the power to make important regulations, are ministerial officers. There is no special municipal council or legislative body, as was the case under the preceding form of municipal government. Congress possesses and has retained the powers of a local legislature. Sometimes it enacts special laws relating to local affairs, and sometimes it delegates to the commissioners extensive powers to make rules and regulations respecting specified subjects. The commissioners have no authority to raise revenues for the support of the local government, and those raised by the direct authority of Congress are not turned over to them for appropriation and expenditure at discretion.

"The title in fee to all streets and public reservations in the city of Washington is vested in the United States, and the public parks have been specially intrusted to the care and supervision of one of the departments of the general government. Congress has specially provided, from time to time, for the improvement and extension of the old, established streets, as well as for the opening of new streets, and the changing and closing of others. While such works are provided to be done under the general supervision of the commissioners, their discretion in all matters, including expenditures, is limited by the authorizing acts, and the special appropria-

> tions for the purpose. The commissioners cannot close streets; they cannot authorize private encroachments, occupations, or obstructions; they are not permitted to authorize the construction of a street-car line in them."

It will be noted that this case specifically decided "the commissioners cannot close streets." The question involved in the instant case is whether or not the Commissioners could abandon Lamont Street in view of the express provision of Congress that land be condemned for the purpose of extending Lamont Street, "said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

From the decision in Walter *vs.* MacFarland petition was made to this Honorable Court for the writ of certiorari. The petition was denied.

Again, in the case of Myers *vs.* D. C., 25 Appeals D. C., 132, the same doctrine is enunciated. Moreover, in the Myers case the Court of Appeals quoted from the opinion of the Supreme Court of the United States handed down in D. C. *vs.* Bailey, 171 U. S. 161, basing the opinion entirely upon what this Court held in the Bailey case. The significant expression which the Court of Appeals selected from the Bailey case for quotation was in the following words:

> "These officers are without general power to contract debts or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress, or which they are authorized to make by express

> statutory authority. The necessary operation of these provisions of the statutes is to cause the District commissioners to be merely administrative officers, with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the commissioners of the District discharge the functions of administrative officials."

Congress having once directed the Commissioners to extend Lamont Street, it is absolutely beyond *their* power to alter such direction or disregard that command.

If the court below is correct in its decision, an interesting question arises as to what becomes of the condemned land. Petitioner must return the money collected in payment of the benefits assessed, which is now the subject of other pending suits, but, having paid for the land and taken title to it, petitioner is in the position of being unable to do anything whatever with it, because it has been judicially determined that the street has been abandoned. We submit that this proposition alone demonstrates the error of the ruling of the court below.

Conclusion.

We, therefore, respectfully submit: First, that there was no contractual obligation existing between the Commissioners of the District and respondent and,

consequently, that the Municipal Court was without jurisdiction over the parties or of the subject-matter of said suit; second, that the Court of Appeals having held, in substance, that a contractual relation did exist, then any right of action thereunder was barred by limitations; third, that there is no valid evidence in the case to support a finding of fact that the District of Columbia had abandoned its intention to extend Lamont Street, and, last, that even were the Commissioners disposed to abandon this project, as a matter of law, they are powerless to do so.

Respectfully submitted,

WILLIAM W. BRIDE,
Corporation Counsel;
ALEX. H. BELL, JR.,
Assistant Corporation Counsel,
Attorneys for Petitioner.